

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

TRAVELERS CASUALTY AND SURETY COMPANY as  
Administrator for RELIANCE INSURANCE COMPANY,

Case No.: 07-CV-6915(DLC)

Plaintiff,

-against-

**ECF CASE**

DORMITORY AUTHORITY – STATE OF NEW YORK,  
TDX CONSTRUCTION CORP., and KOHN PEDERSEN FOX  
ASSOCIATES, P.C.,

Defendants.

**ANSWER OF DAYTON  
SUPERIOR  
CORPORATION TO  
FOURTH-PARTY  
PLAINTIFF'S AMENDED  
COMPLAINT, WITH  
COUNTERCLAIMS,  
CROSS-CLAIMS AND  
ANSWER TO  
CROSS-CLAIMS**

DORMITORY AUTHORITY OF THE STATE OF NEW  
YORK and TAX CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

TRATAROS CONSTRUCTION, INC.,

Third-Party Defendant,

TRATAROS CONSTRUCTION, INC. and TRAVELERS  
CASUALTY AND SURETY COMPANY,

Fourth-Party Plaintiff,

-against-

CAROLINA CASUALTY INSURANCE COMPANY;  
BARTEC INDUSTRIES, INC.; DAYTON SUPERIOR  
SPECIALTY CHEMICAL CORP. a/k/a DAYTON SUPERIOR  
CORPORATION; SPECIALTY CONSTRUCTION BRANDS,  
INC. t/a TEC; KEMPER CASUALTY INSURANCE  
COMPANY d/b/a KEMPER INSURANCE COMPANY;  
GREAT AMERICAN INSURANCE COMPANY;  
NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PA.; UNITED STATES FIRE INSURANCE  
COMPANY; NORTH AMERICAN SPECIALTY  
INSURANCE COMPANY; ALLIED WORLD ASSURANCE  
COMPANY (U.S.) INC. f/k/a COMMERCIAL  
UNDERWRITERS INSURANCE COMPANY; ZURICH  
AMERICAN INSURANCE COMPANY d/b/a ZURICH  
INSURANCE COMPANY; OHIO CASUALTY INSURANCE  
COMPANY d/b/a OHIO CASUALTY GROUP;  
HARLEYSVILLE MUTUAL INSURANCE COMPANY (a/k/a  
HARLEYSVILLE INSURANCE COMPANY); JOHN DOES  
1-20 AND XYZ CORPS.1-19,

Fourth-Party Defendants.

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KOHN PEDERSEN FOX ASSOCIATES, P.C.,

Third-Party Plaintiffs,

- against -

WEIDLINGER ASSOCIATES CONSULTING  
ENGINEERS, PC, CASTRO-BLANCO PISCIONERI  
AND ASSOCIATES ARCHITECTS, PC,  
ARQUITECTONICA NEW YORK, PC, COSENTINI  
ASSOCIATES, INC., CERMAK, PETERKA, PETERSEN,  
INC., JORDAN PANEL SYSTEMS CORP., TRATAROS  
CONSTRUCTION, INC. and LBL SKYSYSTEMS  
(U.S.A.), INC.,

Third-Party Defendants.

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Fourth-Party Defendant, DAYTON SUPERIOR CORPORATION S/H/A DAYTON  
SUPERIOR SPECIALTY CHEMICAL CORP. a/k/a DAYTON SUPERIOR CORPORATION,  
("Dayton" and/or "Fourth-Party Defendant") by its attorneys, Goldberg Segalla LLP, as and for  
its Fourth-Party Answer to Fourth-Party Plaintiffs' Amended Fourth-Party Complaint, states the  
following, upon information and belief:

*Parties, Jurisdiction, and Venue*

FIRST: Denies knowledge or information sufficient to form a belief as to the truth  
of the allegations in the paragraphs designated as "1", "2", "3", "4", "6", "7", "8", "9", "10",  
"11", "12", "13", "14", "15", "16" and "17" of Fourth-Party Plaintiffs' Amended Fourth-Party  
Complaint.

SECOND: Denies the allegations in the paragraph designated as "5" except admits  
that Dayton Superior Corporation and /or its predecessors, successors, parents, subsidiaries,  
affiliates, and/or divisions is incorporated in the State of Delaware with its principal place of  
business located at 4226 Kansas Avenue, Kansas City, Kansas 66106.

Interested Non-Parties

THIRD: Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraphs designated as “18” and “19” of Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint.

Procedural Background

FOURTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraphs designated as “20”, “21”, “22”, “23”, “24”, “25”, “26”, “27”, “28”, “29” and “30” of Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint.

Facts Common to All Counts

FIFTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraphs designated as “31”, “32”, “33”, “34”, “35”, “36”, “37”, “38”, “39”, “43”, “44”, “45”, “46”, “47”, “48”, “49”, “50”, “51”, “52”, “53”, “54”, “55”, “56”, “57”, “58”, “59”, “60”, “61” and “62” of Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint.

SIXTH: Admits the allegations in the paragraphs designated as “40”, “41” and “42” of Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint.

**AS AND FOR A RESPONSE TO THE FIRST COUNT**

*(Contractual Indemnification & Exoneration against Bartec)*

SEVENTH: In answer to the paragraph designated as “63” of the Amended Fourth-Party Complaint, Fourth-Party Defendant Dayton repeats, reiterates and realleges each of the responses set forth in paragraphs “FIRST” through “SIXTH” of this Answer to Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint with the same force and effect as if they were set forth fully and at length herein.

EIGHTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraphs designated as “64”, “65”, “66”, “67”, “68”, “69”, “70” and “71” of Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint.

**AS AND FOR A RESPONSE TO THE SECOND COUNT**

*(Breach of Subcontract, Common-Law Indemnification,  
Contribution & Exoneration against Bartec)*

NINTH: In answer to the paragraph designated as “72” of the Amended Fourth-Party Complaint, Fourth-Party Defendant Dayton repeats, reiterates and realleges each of the responses set forth in paragraphs “FIRST” through “EIGHTH” of this Answer to Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint with the same force and effect as if they were set forth fully and at length herein.

TENTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraphs designated as “73”, “74”, “75”, “76”, “77” and “78” of Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint.

**AS AND FOR A RESPONSE TO THE THIRD COUNT**

*(Professional Negligence, Simple Negligence, Common-Law  
Indemnification, Contribution & Exoneration against Bartec)*

ELEVENTH: In answer to the paragraph designated as “79” of the Amended Fourth-Party Complaint, Fourth-Party Defendant Dayton repeats, reiterates and realleges each of the responses set forth in paragraphs “FIRST” through “TENTH” of this Answer to Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint with the same force and effect as if they were set forth fully and at length herein.

TWELFTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraphs designated as “80”, “81”, “82”, “83”, “84” and “85” of Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint.

**AS AND FOR A RESPONSE TO THE FOURTH COUNT**

*(Performance Bond Claim Against Carolina Casualty by Trataros)*

THIRTEENTH: In answer to the paragraph designated as “86” of the Amended Fourth-Party Complaint, Fourth-Party Defendant Dayton repeats, reiterates and realleges each of the responses set forth in paragraphs “FIRST” through “TWELFTH” of this Answer to Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint with the same force and effect as if they were set forth fully and at length herein.

FOURTEENTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraphs designated as “87”, “88” and “89” of Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint.

**AS AND FOR A RESPONSE TO THE FIFTH COUNT**

*(Performance Bond Claim against Carolina Casualty by Travelers)*

FIFTEENTH: In answer to the paragraph designated as “90” of the Amended Fourth-Party Complaint, Fourth-Party Defendant Dayton repeats, reiterates and realleges each of the responses set forth in paragraphs “FIRST” through “FOURTEENTH” of this Answer to Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint with the same force and effect as if they were set forth fully and at length herein.

SIXTEENTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraphs designated as “91”, “92”, “93”, “94”, “95”, “96” and “97” of Fourth-Party Plaintiffs’ Amended Fourth-Party Complaint.

**AS AND FOR A RESPONSE TO THE SIXTH COUNT**

*(Negligence, Breach of Contract, Breach of Warranty – Indemnification,  
Contribution & Exoneration against Dayton Superior)*

SEVENTEENTH: In answer to the paragraph designated as “98” of the Amended Fourth-Party Complaint, Fourth-Party Defendant Dayton repeats, reiterates and realleges each of

the responses set forth in paragraphs "FIRST" through "SIXTEENTH" of this Answer to Fourth-Party Plaintiffs' Amended Fourth-Party Complaint with the same force and effect as if they were set forth fully and at length herein.

EIGHTEENTH: Denies the allegations in the paragraphs designated as "99", "100", "101", "102", "103", "104" and "105" of Fourth-Party Plaintiffs' Amended Fourth-Party Complaint.

**AS AND FOR A RESPONSE TO THE SEVENTH COUNT**

*(Negligence, Breach of Contract, Breach of Warranty – Indemnification  
Contribution & Exoneration against TEC)*

NINETEENTH: In answer to the paragraph designated as "106" of the Amended Fourth-Party Complaint, Fourth-Party Defendant Dayton repeats, reiterates and realleges each of the responses set forth in paragraphs "FIRST" through "EIGHTEENTH" of this Answer to Fourth-Party Plaintiffs' Amended Fourth-Party Complaint with the same force and effect as if they were set forth fully and at length herein.

TWENTIETH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraphs designated as "107", "108", "109", "110", "111", "112" and "113" of Fourth-Party Plaintiffs' Amended Fourth Party Complaint.

**AS AND FOR A RESPONSE TO THE EIGHTH COUNT**

*(Breach of Contract(s), Professional Negligence and/or Simple Negligence – Indemnification,  
Contribution & Exoneration against John Does 1-20 and XYZ Corps. 1-19)*

TWENTY-FIRST: In answer to the paragraph designated as "114" of the Amended Fourth-Party Complaint, Fourth-Party Defendant Dayton repeats, reiterates and realleges each of the responses set forth in paragraphs "FIRST" through "TWENTIETH" of this Answer to Fourth-Party Plaintiffs' Amended Fourth-Party Complaint with the same force and effect as if they were set forth fully and at length herein.

TWENTY-SECOND: Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraphs designated as "115", "116", "117", "118", "119", "120", "121" and "122" of Fourth-Party Plaintiffs' Amended Fourth Party Complaint.

**AS AND FOR A RESPONSE TO THE NINTH COUNT**

*(Insurance Coverage – Declaratory Judgment, Indemnification, Contribution & Exoneration against Kemper, Great American, National Union, US Fire, Allied World, Zurich, Ohio Casualty, Harleysville, and XYZ Corps. 1-19)*

TWENTY-THIRD: In answer to the paragraph designated as "123" of the Amended Fourth-Party Complaint, Fourth-Party Defendant Dayton repeats, reiterates and realleges each of the responses set forth in paragraphs "FIRST" through "TWENTY-SECOND" of this Answer to Fourth-Party Plaintiffs' Amended Fourth-Party Complaint with the same force and effect as if they were set forth fully and at length herein.

TWENTY-FOURTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraphs designated as "124", "125", "126", "127", "128", "129", "130", "131", "132", "133", "134", "135", "136", "137", "138", "139", "140", "141", "142", "143", "144", "145", "146", "147", "148", "149", "150" and "151" of Fourth-Party Plaintiffs' Amended Fourth Party Complaint.

**AS AND FOR COUNTERCLAIMS AGAINST TRATAROS CONSTRUCTION, INC. AND TRAVELERS CASUALTY AND SURETY COMPANY**

TWENTY-FIFTH: That if this answering Fourth-Party Defendant is held liable to Fourth-Party Plaintiffs in this action, such liability and damages will have arisen out of and have been contributed to in all or in part by the breach of contract, breach of warranty or other breach of duty and/or strict liability of the Fourth-Party Plaintiffs named above, and in such event this answering Fourth-Party Defendant demands judgment over and against said Fourth-Party Plaintiffs in indemnity and /or contribution, for the amount of any verdict or judgment



which shall or may be had against this answering Fourth-Party Defendant in this action, together with all costs and expenses which may be incurred in the defense of this action.

TWENTY-SIXTH: This Fourth-Party Defendant further counterclaims against Fourth-Party Plaintiffs for apportionment and full recovery of any damages awarded against this answering Fourth-Party Defendant as determined by the relative culpability of Fourth-Party Plaintiffs for the damages claimed as a result of the negligence of TRATAROS CONSTRUCTION, INC. in the supervision and control of the flooring work and the coordination of the work.

**AS AND FOR A CROSS-CLAIMS AGAINST FOURTH-PARTY  
DEFENDANTS BARTEC INDUSTRIES, INC. AND SPECIALTY  
CONSTRUCTION BRANDS, INC. t/a TEC;**

TWENTY-SEVENTH: If Fourth-Party Plaintiffs sustained any damages as alleged in the Amended Fourth-Party Complaint, which this answering Fourth-Party Defendant expressly denies, then such damages were caused by reason of the culpable conduct, acts or omissions, negligence, strict products liability, statutory violation, breach of contract, obligation or warranty of the Fourth-Party Defendants named above.

TWENTY-EIGHTH: By reason of the foregoing, this answering Fourth-Party Defendant is entitled to indemnification or contribution from, and to have judgment against the Fourth-Party Defendants named above, for all and/or part of any verdict or judgment that Fourth-Party Plaintiffs may recover against this answering Fourth-Party Defendant.

TWENTY-NINTH: This answering Fourth-Party Defendant further cross-claims against the above Fourth-Party Defendants for apportionment and full recovery of any damages awarded against this Fourth-Party Defendant as determined by their relative culpability for the damages claimed as a result of their negligence in the installation of the flooring system



and in the providing and use of an improper product as well as the failure to provide appropriate instructions and directions for the use of said product.

#### **FIRST AFFIRMATIVE DEFENSE**

The Fourth-Party Amended Complaint fails, in whole or in part, to state a claim upon which relief may be granted against Dayton, and must therefore be dismissed.

#### **SECOND AFFIRMATIVE DEFENSE**

The damages sustained by Fourth-Party Plaintiffs, as alleged in the Fourth-Party Amended Complaint, which allegations are expressly denied, were caused in whole or in part by the contributory negligence and/or culpable conduct of Fourth-Party Plaintiffs, and this answering Fourth-Party Defendant is not liable to Fourth-Party Plaintiffs or, alternatively, this answering Fourth-Party Defendant's liability to Fourth-Party Plaintiffs is partial only and should be reduced in accordance with applicable law.

#### **THIRD AFFIRMATIVE DEFENSE**

If Fourth-Party Plaintiffs sustained any damages as alleged in the Fourth-Party Amended Complaint, which allegations are expressly denied, then same were caused by the negligence and/or culpable conduct of other parties, their agents or employees, or by others over whom this answering Fourth-Party Defendant had no control at any time relevant hereto, and in the event this answering Fourth-Party Defendant is found liable to Fourth-Party Plaintiffs, which liability is expressly denied, this answering Fourth-Party Defendant will be entitled to indemnification, contribution or apportionment of liability pursuant to applicable law.

#### **FOURTH AFFIRMATIVE DEFENSE**

Fourth-Party Plaintiff TRATAROS CONSTRUCTION, INC. was comparatively negligent and its culpable conduct bars or diminishes a proportion of its claimed damages.

**FIFTH AFFIRMATIVE DEFENSE**

The Fourth-Party Amended Complaint and the damages claimed therein must be reduced by the culpable conduct of Defendants DORMITORY AUTHORITY - STATE OF NEW YORK, TDX CONSTRUCTION and KOHN PEDERSEN FOX ASSOCIATES, P.C.

**SIXTH AFFIRMATIVE DEFENSE**

Upon information and belief, Fourth-Party Plaintiffs has failed to mitigate its damages and the damages of Defendant DORMITORY AUTHORITY – STATE OF NEW YORK.

**SEVENTH AFFIRMATIVE DEFENSE**

The damages sought in the Fourth-Party Amended Complaint are speculative and unsubstantiated.

**EIGHTH AFFIRMATIVE DEFENSE**

This answering Fourth-Party Defendant pleads Article 16 of CPLR and the limitations contained therein.

**NINTH AFFIRMATIVE DEFENSE**

The damages sustained by Fourth-Party Plaintiffs as alleged in the Fourth-Party Amended Complaint, which allegations are expressly denied, were caused and brought about by intervening, interceding and superseding acts and were not caused by this answering Fourth-Party Defendant or by a person or entity for whom this answering Fourth-Party Defendant is responsible.

**TENTH AFFIRMATIVE DEFENSE**

The claims asserted in the Fourth-Party Amended Complaint are barred, in whole or in part, because Fourth-Party Plaintiffs have failed to join all necessary and indispensable parties for a just adjudication.

**ELEVENTH AFFIRMATIVE DEFENSE**

Fourth-Party Plaintiffs could, with due diligence, have obtained personal jurisdiction over tortfeasors not parties to this lawsuit and thus the culpability of these missing or absent tortfeasors may be computed into the apportionment of total culpability causing the subject occurrence.

**TWELFTH AFFIRMATIVE DEFENSE**

This answering Fourth-Party Defendant hereby asserts and seeks the full benefit of General Obligations Law § 15-108 and its provisions relating to the settlement between Fourth-Party Plaintiffs and any joint tortfeasor.

**THIRTEENTH AFFIRMATIVE DEFENSE**

This answering Fourth-Party Defendant reserves its right to assert any additional affirmative defenses and claims of avoidance as may be appropriate based upon the facts and issues disclosed during the course of additional investigation and discovery.

**ANSWER TO ALL CROSS-CLAIMS**

This Fourth-Party Defendant denies any and all cross-claims asserted against it and denies each and every allegation made in support of such cross-claims.

**AFFIRMATIVE DEFENSES TO CROSS-CLAIMS**

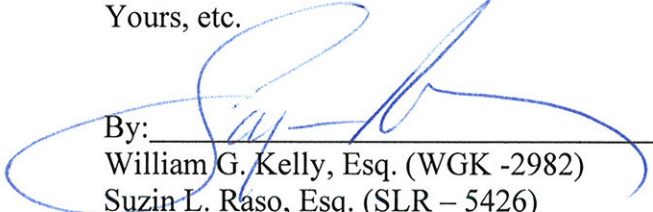
In further response to all cross-claims, this Fourth-Party Defendant repeats and realleges each and every affirmative defense asserted in its Answer to the Fourth-Party Amended Complaint and incorporates them herein by reference.

**WHEREFORE**, Fourth-Party Defendant DAYTON SUPERIOR CORPORATION S/H/A DAYTON SPECIALTY CHEMICAL CORP. a/k/a DAYTON SUPERIOR CORPORATION, demands judgment:

- (a) Dismissing the Fourth-Party Amended Complaint in its entirety as against Dayton, together with all cross-claims against Dayton;
- (b) On the counterclaims and cross-claims herein, awarding Dayton indemnity and/or contribution and judgment over and against the parties named herein for all or any part of any verdict or judgment which any party to this action may recover against Dayton, all determined in accordance with the relative culpability of each party liable herein; and
- (c) For the costs, attorneys' fees and disbursements of the within action, and for such other, further or different relief which the Court may deem just and proper.

Dated: White Plains, New York  
April 29, 2008

Yours, etc.

By:   
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(914) 798-5400  
GS File No.: 15180.0001

TO: *See Attached Certification of Service*

**CERTIFICATION OF SERVICE**

The undersigned hereby certifies that on the 29th day of April 2008, she caused a true copy of the foregoing **Fourth-Party Answer of Dayton Superior Corporation, with Counterclaims, Cross-Claims and Answer to Cross-Claims** to be electronically filed with the Clerk of the Southern District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants in this case:

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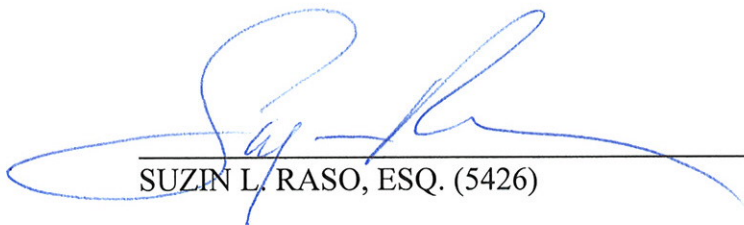
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Dated: White Plains, New York  
April 29, 2008



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SUZIN L. RASO, ESQ. (5426)

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